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IN THE

Supreme Court of the United States

STANFORD HOSPITAL AND CLINICS, SUCCESSOR TO UCSF STANFORD HEALTH CARE,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 715,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978), and *NLRB v. Baptist Hospital*, 442 U.S. 773, 775 (1979), this Court addressed a hospital's right to restrict union organizing on hospital grounds. This case presents several critical questions left open by those cases:

1. May a hospital adopt rules preventing its employees from approaching patients and their families with union-organizing issues and literature on hospital grounds?

2. Is it irrational for the National Labor Relations Board to presume that "patient care" in an acute care hospital occurs only in "patient rooms, operating rooms, and places where patients receive treatment," and not in sitting areas where patients and their families wait for, receive and reflect on medical advice and counseling?

3. In considering whether a hospital may prohibit union solicitation in an area, should ready availability of other areas of the hospital for solicitation and organizational activity be a factor?

STATEMENT PURSUANT TO RULE 29.6

Petitioner Stanford Hospital and Clinics is a California nonprofit public benefit corporation that does not issue stock and has no parent corporation (its sole corporate member is the Trustees of Leland Stanford Junior University).

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STATEMENT OF JURISDICTION

The Court of Appeals' judgment was entered on May 15, 2003 (App. E). A timely petition for rehearing was denied on June 30, 2003 (App. D). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 157, provides:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), provides:

> It shall be an unfair labor practice for an employer (1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 157 of this title.

STATEMENT OF THE CASE

A. Factual Background

This case raises important, unresolved questions concerning the permissible scope of hospital rules limiting employees in soliciting union support on hospital grounds.

This case involves two hospitals in Palo Alto, California—Stanford Hospital and Clinics ("Stanford Hospital") and Lucile Packard Children's Hospital ("Children's Hospital"). App. 35a, 36a. Both hospitals are acute care facilities. Each hospital sees and treats patients with life-threatening illnesses. Each hospital has an oncology unit, intensive care unit and organ transplant unit. App. 134a, 147a, 155a, 156a. The hospitals, although separately administered, are contiguous.

Both hospitals see family support as a critical part of patient care. This is particularly so in the case of the Children's Hospital. App. 123a. The hospital experience can be extremely punishing for parents of a sick or injured child. Treatment can inflict unavoidable pain and prolonged discomfort on an uncomprehending child. Being with the child at such times, which the hospital encourages for the child's benefit, takes a heavy toll on parents. App. 127a. At both facilities, but particularly at the Children's Hospital, families make the decisions concerning treatment. Particularly at the Children's Hospital, family members frequently remain in the hospital around the clock, sleeping in the patient room and staying with the patient during the day. All patients' rooms in the Children's Hospital have a bed in the room to allow parents to spend the night. App. 123a. The hospital has "day rooms" where family members can be with their child. App. 125a.

In both hospitals, the times of waiting for tests or results, the conferences with physicians, the process of absorbing the information received and making decisions can be difficult for patients and their families. The patient's room can become claustrophobic for patients and families and ill-suited to private conversation or reflection. More than 40 persons—employees and physicians—can enter a patient's room in a day for one purpose or another. Patients and families need additional places they can retreat to for relief from the room, for private conferences with physicians or for reflection on what is happening and what they are learning about the course of their treatment. App. 135a n.53.

On the patient floors, each hospital has separate medical specialty departments ("nursing units") connected by hallways. App. 86a. Some units at the Children's Hospital, such as intensive care, have sitting areas for patients and their families inside the doors of the nursing unit. App. 144a. In other nursing units, the family and patient sitting areas are outside the doors of the nursing unit in the connecting areas between units. Both hospitals use these sitting areas, regardless of whether they are inside or outside a nursing unit, for exactly the same purposes. Physicians use sitting rooms for private conferences with patients and families about the course of treatment. Families and patients use these areas for respite from patients' rooms; they wait for procedures or for results; they ponder treatment issues, and absorb and reflect on outcomes. Patients and family members are sometimes observed crying in these areas. Patients sometimes receive medication from staff in these rooms and medical exigencies have occurred in these areas, requiring staff to come to the aid of a patient, such as when an alarm sounds on a monitoring device. App. 144a, 145a, 148a-150a, 156a. Employees are not supposed to use these sitting areas

except to transport patients, to clean or otherwise to do assigned work. App. 141a.

The location of a waiting area outside a nursing unit does not mean that the patients and families in that area confront less serious medical issues or that the area has a different function. For example, at both hospitals, the transplant unit has waiting areas outside the boundaries of the nursing unit. App. 133a, 156a. At the Children's Hospital, the patient's room or the space inside the nursing unit may sometimes be inappropriate for conferences, decision-making, reflection or grief. App. 127a-128a, 135a n.53.

In November 1997, the Service Employees International Union, Local 715 AFL-CIO ("Union"), began an organizing drive in a unit of service and maintenance employees (excluding nurses, who were separately represented) at the two hospitals. During the campaign, hospital employees and full-time union organizers solicited both employees and non-employees inside and outside the hospitals, and distributed union literature to them. App. 115a.

Responding to these activities, the hospitals reissued a policy intended to avoid disrupting patient care and to prevent disturbing patients and their families. App. 117a. The policy prohibited solicitation of employees in "patient care areas at any time." App. 117a.

The rule defined "patient care areas" as "patient rooms, patient treatment and procedure rooms or areas, patient admitting or registration areas, patient waiting rooms, lounges used by patients and other families or visitors and the hallways immediately adjacent to all such areas." App. 118a. Under this rule, solicitation of employees was permitted

throughout the ground floor of both hospitals, except the enclosed admitting areas, adjacent patient waiting areas and waiting areas next to the laboratory and pharmacy. Solicitation of employees was also permitted in both cafeterias, employee break rooms and lunch rooms, in all hallways on all floors not immediately adjacent to "patient care" areas and all areas outside the building. App. 121a.

The rule further provided that "employees are prohibited from soliciting and distributing literature to non-employees (patients, visitors, etc.) at any time on UCSF-Stanford [the two hospitals were, at that time, part of a "UCSF-Stanford" medical services organization] property." App. 118a.

Some employees engaged in solicitation and distribution of literature in violation of all aspects of the rule. They solicited and distributed literature in areas that were undisputedly patient care areas, inside the nursing units as well as outside the nursing units. App. 151a, 153a, 155a, 156a. They distributed literature to patients on hospital premises. App. 80a; A0484-485 (citations to "A0____" refer to the record before the Court of Appeals). Union literature introduced at the hearing described "how our union can help" with alleged problems such as "short staffing or heavy workloads" claimed to be "harmful to the patients all of us have a role in caring for." The literature alleged "we don't always have the training we need to do our new duties or work effectively in units we're not familiar with." It quoted an employee as saying "if something happened to the patients, we don't know CPR. Some of us are not comfortable doing this without more training." A0644.

B. Procedural History

The Union filed unfair labor practice charges with the Board, claiming that the hospitals' policy violated sections 7 and 8(a)(1) of the NLRA. Following a four-day evidentiary hearing, an administrative law judge upheld the policy as applied inside the nursing units, as well as admitting and registration areas, on the ground that these were "immediate patient care" areas. App. 195a. With respect to waiting areas and lounges outside nursing units, however, the ALJ ruled that these were not immediate patient care areas. Thus, according to the ALJ, the policy violated sections 7 and 8(a)(1) because the hospitals failed to demonstrate that solicitation and distribution activities in those areas were likely to interfere with patient care. App. 226a.

With respect to the prohibition against soliciting nonemployees, the ALJ found that the prohibition was overbroad because the hospitals failed to demonstrate a likelihood of patient disturbance that would justify the ban. App. 231a-232a. The ALJ did not consider evidence that the rule left many areas available for solicitation. The Board affirmed the ALJ's decision. App. 28a.

Stanford Hospital and Clinics (the successor to UCSF Stanford Health Care, which had operated the hospitals during the time in question) filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals denied the petition for review with respect to the hospitals' solicitation and distribution policy.

In ruling on the restriction on solicitation in waiting areas outside nursing units, the Court of Appeals restated and relied on the Board's presumption that hospitals may ban solicitation and distribution activities in patient care areas, defined as "patient rooms, operating rooms, and places where patients receive treatment," but that hospitals may not ban solicitation and distribution outside patient care areas unless "necessary to avoid disruption of health-care operations or disturbance of patients." App. 7a. Applying the Board's presumption, the Court of Appeals placed the burden on the hospitals to demonstrate a likelihood of patient disturbance, and concluded that the hospitals had not met this standard. App. 8a.

With respect to the prohibition on solicitation directed at nonemployees, the Court of Appeals ruled that there was no "substantive distinction between solicitation of fellow employees and nonemployees." App. 16a. The Court of Appeals dismissed as dictum this Court's statement in *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 503 n.23 (1978), that "a rule forbidding any distributions to or solicitation of nonemployees would do much to prevent potentially upsetting literature from being read by patients." App. 19a. The Court of Appeals approved the conclusion of the ALJ that Petitioners had not shown that this activity "had any adverse effect upon patient care." App. 19a. The Court of Appeals, like the Board, did not consider the availability of other areas for solicitations.

REASONS FOR GRANTING THE PETITION

This case presents several critical questions left open in *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978) and *NLRB v. Baptist Hospital*, 442 U.S. 773 (1979), concerning the ability of a hospital to prohibit solicitations by employees that are likely to interfere with patient care.

The first issue is whether a hospital can prevent employees who are on their own time from approaching patients and their families with union-organizing issues and literature. This Court, in *Beth Israel*, assumed that a rule preventing employees from approaching patients and families would be permissible. 437 U.S. at 503 n.23 ("a rule forbidding any distribution to or solicitation of nonemployees would do much to prevent potentially upsetting literature from being read by patients"). Yet, contrary to *Beth Israel*, the Court of Appeals held that a hospital's rule preventing employees from involving patients and their families is unlawful. An employee on a break should not be allowed to undermine the employer's legitimate objectives and alienate customers. This is particularly critical when the employer is an acute care hospital and the "customers" are patients and families.

This case also presents a second critical question, discussed, but expressly left undecided in *Baptist Hospital*: Is it irrational for the Board to presume that "patient care" occurs only in "patient rooms, operating rooms, and places where patients receive treatment," and does not also occur in nearby waiting areas where patients and their families seek refuge from the patient unit, receive medical advice and counseling, ponder decisions, and reflect on information about their condition? For many years, the Board has

presumed that solicitation in patient care areas is likely to disrupt patient care and that solicitation outside these patient care areas will not. The Board has, however, adopted a definition of "patient care" that this Court has strongly questioned (*see Baptist Hospital*, 442 U.S. at 788-90).

The Board has narrowly defined patient care areas as "the patients' rooms, operating rooms, and places where patients receive treatment." *St. John's Hospital & School of Nursing, Inc.*, 222 N.L.R.B. 1150 (1976), *enforced in part*, 557 F.2d 1368 (10th Cir. 1977). In *Baptist Hospital* this Court expressed "serious doubt" as to the validity of the Board's definition of "patient care." 442 U.S. at 789. This Court stated "Patients not undergoing treatment at the moment are cared for in a variety of settings—recovery rooms, intensive-care units, patients' rooms, wards, sitting rooms and even the corridors where patients are encouraged to walk, or visit with their families." 442 U.S. at 789 n.16. This Court in *Baptist Hospital* ultimately did not rule on the Board's definition but urged the Board to review its definition. This case squarely presents the issue expressly reserved in *Baptist Hospital*—whether it is irrational for the Board to define "patient care" areas as including only areas where direct treatment is administered.

Review of this case would also allow this Court to resolve a third question left undecided in *Beth Israel*: In considering whether a hospital may prohibit union solicitation in an area, should the availability of other areas of the hospital for solicitation and organizational activity be a factor? Dictum in *Beth Israel* suggests that "the availability of one part of a health-care facility for organizational activity might be regarded as a factor required to be considered in evaluating the permissibility of restrictions in other areas of the same

facility." 437 U.S. at 505. Nevertheless, the Board and the Court of Appeals ignored the evidence in this case that many other areas of the hospital were available for union solicitation. This Court should clarify that availability of other areas for union solicitation should be a factor in considering whether a hospital may prohibit solicitation in an area.

I.

A HOSPITAL SHOULD BE ALLOWED TO PREVENT ITS EMPLOYEES FROM SOLICITING PATIENTS AND THEIR FAMILIES ON HOSPITAL GROUNDS.

In *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978), this Court assumed that a hospital would be allowed to prohibit its employees from soliciting patients and their families on hospital grounds. *Beth Israel* upheld a Board decision that a hospital could not prohibit union solicitation in a hospital cafeteria, but this Court noted that the Board had "not foreclosed the hospital from imposing less restrictive means of regulating organizational activity more nearly directed toward the harm to be avoided." 437 U.S. at 503.

> For example, a rule forbidding any distribution to or solicitation of nonemployees would do much to prevent potentially upsetting literature from being read by patients. [Beth Israel Hospital], in fact, has such a rule. . . .

Beth Israel, 437 U.S. at 503 n.23.

Nevertheless, the Court of Appeals in this case dismissed the statement in *Beth Israel* as "dicta" (App. 19a). The Court of Appeals ruled that there is no "substantive distinction between solicitation of fellow employees and nonemployees." App. 16a.

The Court of Appeals' sweeping statement might be true in some contexts, such as a strike, where appeals to the public are accepted; however, employee organizing is supposed to be governed by the decisions of employees. In this context, economic pressure on the employer is less protected and can be unlawful. *See* NLRA § 8(b)(4) and § 8(b)(7) (29 U.S.C. § 158(b)(4)(A), (7)) (restricting picketing or appeals for boycotts for organizing purposes). In the organizing context, the District of Columbia Circuit itself has observed:

> A long history of cases manifests a hierarchy among Section 7 rights, with organizational rights asserted by a particular employer's own employees being the strongest, the interests of non-employees in organizing an employer's employees being somewhat weaker, and the interest of uninvited workers in undertaking area standards activity, or otherwise attempting to communicate with an employer's customers being weaker still.

United Food and Commercial Workers v. National Labor Relations Board, 74 F.3d 292, 298 (D.C. Cir. 1996).

Similarly, where the employee's activity can undermine the employer's business, the employer's interests can outweigh even the most fundamental Section 7 rights. For example, a no-solicitation rule is presumptively valid

with respect to all selling areas of a retail store, even when employees are off-duty. *May Department Store*, 59 N.L.R.B. 976 (1944). In *Marriott Corporation*, 223 N.L.R.B. 978 (1976) the Board ruled that "restaurants, . . . because of the nature of their business, may prohibit solicitation, even during break and lunch periods, in areas where customers are likely to be present." *See Goldblatt Bros., Inc.*, 77 N.L.R.B. 1262, 1264 (1948) (Employees could be prohibited from soliciting in store's selling area, and in restaurant where employees and customers eat because "union solicitation in the restaurants is apt to disrupt the respondent's business."), *quoted with approval*, *Beth Israel Hospital*, 437 U.S. at 503 n.21.

The Court of Appeals approved the ALJ's conclusion that the hospitals had not shown "any adverse effect upon patient care." App. 19a. That is not the correct standard in any setting. No previous case has required a retail store or a restaurant to prove an actual adverse effect on business in order to justify a restriction on even employee-to-employee solicitation. Presumably, a retail store could prevent its employees from using their break times to argue to customers that the store's merchandise is shoddy and overpriced. *A fortiori*, a hospital should not be required to show an actual adverse effect on patients where employees are approaching patients with leaflets that assert a supposed lack of training or lack of competence in life-saving procedures; what matters is only that it "is apt to disrupt patient care." More than any other workplace, hospitals, "carry on a public function of the utmost seriousness and importance" and "give rise to unique considerations." *Baptist Hospital*, 442 U.S. at 790, *quoting Beth Israel*, 437 U.S. at 508.

II.

THIS COURT SHOULD RESOLVE THE QUESTION LEFT UNDECIDED IN *NLRB v. BAPTIST HOSPITAL*, 442 U.S. 773 (1979): WHETHER IT IS IRRATIONAL FOR THE NLRB TO PRESUME THAT PATIENT CARE OCCURS ONLY IN "PATIENT ROOMS, OPERATING ROOMS, AND PLACES WHERE PATIENTS RECEIVE TREATMENT," AND NOT IN NEARBY WAITING AREAS WHERE PATIENTS AND THEIR FAMILIES RECEIVE MEDICAL ADVICE AND COUNSELING.

For many years, the Board has presumed that solicitation in patient care areas disrupts care and may be prohibited. The Board has defined patient care areas as "the patients' rooms, operating rooms, and places where patients receive treatment." *St. John's Hospital & School of Nursing, Inc.*, 222 N.L.R.B. 1150 (1976), *enforced in part*, 557 F.2d 1368 (10th Cir. 1977). In this case, the Court of Appeals restated and relied on that presumption:

> Under *St. John's*, hospitals may ban solicitation and distribution activities even during nonwork time in "patient care areas, such as the patients' rooms, operating rooms, and places where patients receive treatment" because "[s]olicitation at any time in those areas might be unsettling to the patients." Outside patient care areas, however, "a hospital may ban solicitation and distribution only as necessary to avoid disruption of health-care operations or disturbance of patients."

App. 7a (citations omitted), *quoting Brockton Hosp. v. NLRB*, 294 F.3d 100, 103 (D.C. Cir. 2002).

This Court, however, has never adopted the Board's definition of "patient care"; indeed, this Court initially envisioned a broader definition, stating in *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978) that, "The main function of the hospital is patient care and therapy and those functions are largely performed in areas such as operation rooms, patients' rooms, and patients' lounges." 437 U.S. at 506.

In *Baptist Hospital*, this Court approved in concept the Board's presumption that no-solicitation rules are valid in "immediate patient care" areas but are invalid elsewhere. However, this Court underscored its doubts about the Board's definition of "patient care." Noting that "the scope of the Board's presumption depends upon the definition of the phrase 'immediate patient-care areas'" (442 U.S. at 779), this Court expressed "serious doubts as to whether the Board's interpretation of its present presumptions adequately takes into account the medical practices and methods of treatment incident to the delivery of patient-care services in a modern hospital." 442 U.S. at 789. This Court noted:

> The Board, in reviewing the scope and application of its presumption, should take into account that a modern hospital houses a complex array of facilities and techniques for patient care and therapy that defy simple classification. Patients not undergoing treatment at the moment are cared for in a variety of settings—receiving rooms, intensive-care units, patients' rooms, wards, sitting rooms, and even the corridors, where patients often are encouraged to walk or to visit their families.

442 U.S. at 789 n.16. This case squarely presents the issue expressly reserved in *Baptist Hospital*—whether the Board's definition of patient care is irrational.

That presumption is, in fact, irrational. Like most hospitals, the two hospitals here view "patient care" as more than performing surgery, diagnostic testing or administering medication—patient care includes appropriate concern and support for patients and their families while they are pondering treatment options, waiting for treatment, or waiting for results of tests or examinations. Communicating test results, giving medical advice, and counseling patients and their families are all part of patient care. Sometimes patients and their families must be given time and space to reflect on unfavorable news or take respite. It is irrational to say that meeting these needs is something other than "patient care." Hospitals must be able to establish reasonable rules to protect patients and their families in patient care areas broadly defined to include waiting areas where patients and their families often receive medical advice and counseling.

The proper definition of "patient care" is the decisive point in this case. While the Court of Appeals made factual observations in support of its conclusion that the no-solicitation rule was not appropriate in the waiting areas outside the nursing units, each of those factual statements applies equally or more strongly to the sitting areas inside the nursing unit, which were determined to be in "patient care" areas.

The Court of Appeals noted that the hospitals had not "barred employees from the waiting areas outside the units . . . nor prohibited employees from eating or sleep in lounges or waiting rooms." App. 9a. The evidence showed that the hospitals allowed employees to take breaks and eat in the "day rooms" inside the nursing units (where the no-solicitation rule was upheld) and that this was a routine occurrence. With respect to some of the waiting areas outside

the units, there was testimony asserting that employees had been seen eating or sleeping in the lounges, but no indication that this was routine or that anyone in management knew of this activity, except for one employee appreciation lunch.

The Court of Appeals also noted the evidence that the hospitals had given employees materials opposing the Union with their paychecks. There was no indication that any such distribution by management had occurred in a no-solicitation area, but the ALJ concluded that the hospitals had not provided specific rules limiting where paychecks would be distributed. One witness testified she saw such material on the desk at her nurse's station. One such flyer was taped to a cupboard at the back of a nursing unit and one was taped to a wall inside a laboratory area where it could be seen by a patient at the window counter. The incidents of leaving the flyer on a desk and taping the flyers up were not attributed to management. The Court of Appeals combined these facts into the assertion that "Stanford itself posted anti-union materials discussing the possibility of strikes 'without limiting the areas of . . . distribution.'" App. 9a [Internal quotes and ellipses in original]. That may not be a fair summary of the facts, but, more importantly, all the incidents occurred in areas which the ALJ concluded were patient care areas despite these facts.

The Court of Appeals found it inexplicable that the hospitals did not bar all activities likely to disturb patients. The Court of Appeals noted that waiting areas were not necessarily used by patients and families at all times, particularly at night, and that there were no complaints about union solicitation. These observations are also equally applicable to sitting rooms, whether inside or outside the nursing units. Thus, the factual assertions noted by the Court of Appeals are not sufficient to overcome the presumption that there should not be solicitations in "patient care" areas.

The key question is thus whether the Board is applying a rational definition of "patient care." Nearly 25 years after first identifying this important issue in *Baptist Hospital*, this Court should resolve this important issue now.

III.

THIS COURT SHOULD ALSO RESOLVE A QUESTION LEFT UNDECIDED IN *BETH ISRAEL HOSPITAL v. NLRB*, 437 U.S. 483 (1978): IN CONSIDERING WHETHER A HOSPITAL MAY PROHIBIT UNION SOLICITATION IN AN AREA, SHOULD THE AVAILABILITY OF OTHER AREAS OF THE HOSPITAL FOR SOLICITATION AND ORGANIZATIONAL ACTIVITY BE A FACTOR?

Recognizing "the importance of the employer's interest in protecting patients from disturbance," this Court suggested in *Beth Israel* that in considering whether a hospital may prohibit union solicitation in an area, the availability of other areas of the hospital for solicitation should be a factor:

> While outside of the health-care context, the availability of alternative means of communication is not, with respect to employee organizational activity, a necessary inquiry, it may be that the importance of the employer's interest here demands use of a more finely calibrated scale. For example, the availability of one part of a health-care facility for organizational activity might be regarded as a factor required to be considered in evaluating the

> permissibility of restrictions in other areas of the same facility.

Beth Israel, 437 U.S. at 505. Ultimately, however, this Court found that factor inapposite in *Beth Israel* because the alternative areas for organizational activity were not suitable. 437 U.S. at 505.

Here, the evidence showed that other areas of the hospital were available and suitable for union solicitation. Cafeterias, employee break rooms, outside areas, and numerous hallways (away from patient areas) were available for employee-to-employee union solicitation and organizational activities. App. 121a. Nevertheless the Board and the Court of Appeals ignored this evidence. In ignoring the availability of other areas, the Court of Appeals failed to properly balance the hospital's legitimate interests against any minimal burden on employees' rights. *See St. John's Hospital & School of Nursing, Inc. v. NLRB*, 557 F.2d 1368, 1374-75 (10th Cir. 1977) ("An additional factor to be considered in striking the proper balance between the rights of the employees, the Hospital, and the patients is the availability of other areas in which union activities are permitted").

This Court should clarify this important issue left undecided in *Beth Israel*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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